Supreme Court, U.S.
FILED
AUG 20 1997
CLERK

(2)

No. 97-128

In The

Supreme Court of the United States

October Term, 1996

ROD McKINNEY and CF AIR FREIGHT EMPLOYEES,

Petitioners,

vs.

EMERY AIR FREIGHT CORPORATION d/b/a EMERY WORLDWIDE, A CF COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to review the Ninth Circuit's unpublished decision that Petitioners' duty of fair representation claims were either time-barred or without merit, when there is no conflict among federal courts on the issues decided, and the Ninth Circuit applied well-settled legal principles to a unique set of facts?

LIST OF PARTIES

1. Petitioner Rod McKinney.

2. Petitioner CF Air Freight Employees.

3. Respondent Emery Air Freight Corporation. Respondent's parent company is CNF Transportation Inc. Respondent's nonwholly owned subsidiaries are Emery Worldwide (India) Private Limited and Emery Transnational Air Cargo Corporation.

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STATEMENT OF THE CASE

The long and complicated factual background to this case is summarized in the unpublished opinions of the Ninth Circuit and the District Court below, as well as the Ninth Circuit's earlier decision in *McKinney v. Emery Air Freight Corporation*, 954 F.2d 590 (9th Cir. 1992) ("*McKinney I*"). In *McKinney I*, Petitioners brought an action against Respondent Emery Air Freight Corporation ("Emery") for declaratory relief concerning the status of a collective bargaining agreement following a corporate merger and work force consolidation involving CF Air Freight, Inc. ("CFAF") and Emery. After the merger and consolidation, the former CFAF employees became Emery employees, working at Emery terminals in a bargaining unit governed by a collective bargaining agreement between Emery and three Teamster locals. In *McKinney I*, Petitioners sought a declaratory judgment that they continued to have rights under the collective bargaining agreement which had governed their employment by CFAF. The Ninth Circuit held that the question of whether the CFAF agreement "remained in effect after the consolidation of the work forces" was required to be resolved through arbitration. On remand, the District Court ordered that the dispute be resolved through the Joint Western Area Committee ("JWAC") grievance procedures contained in the agreement.

During proceedings in *McKinney I*, Petitioners' union, Local 85, had taken the position that the former CFAF employees became part of the Emery bargaining unit after the merger, and were therefore covered by the collective bargaining agreement between Emery and the Teamster locals, rather than the agreement which covered the former CFAF bargaining unit. After the Ninth Circuit and District Court ordered arbitration, Local 85 informed Petitioners' attorney that "[i]n view of the history of the positions taken by the parties at various stages of

this proceeding, Local 85 does not believe it appropriate to be the spokesperson at JWAC for Mr. McKinney and the group he represents. A representative of Local 85 will attend the hearing and will take appropriate steps to insure that Mr. McKinney and/or other members he represents will have a full opportunity to present their case." The District Court found that this "was an unequivocal statement by the union's counsel that the union would *not* represent the plaintiffs at the JWAC hearing, but would do no more than procedurally keep the proceedings open for plaintiffs to present their own case." Petitioners' Appendix ("App.") p. 7a. Local 85 also sent written communications to Petitioners advising them of the dates of the hearing and whom to contact for further information.

At the first JWAC hearing, scheduled for August 1993, the hearing was postponed because no one appeared on behalf of Petitioners, and the hearing was continued until November 1993. Local 85's counsel advised Petitioners' counsel of the November hearing and the person to contact for further information. However, neither Petitioners nor their counsel responded to this communication, and no representative of Petitioners contacted the appropriate person for further information about the hearing. At the JWAC hearing on November 8, 1993, no one appeared on behalf of Petitioners. After a presentation made by Emery, the JWAC, which consisted of a four member panel, issued a decision finding that:

> [T]he Local 85 contract did not follow the former CF Air Freight employees to the Emery terminals when they were integrated into the Emery work force, that it did not continue to control their working conditions at the Emery terminals, and that it had no continuing effect after the work force consolidation.

App. p. 48a. Archie Murrietta was not a member of the panel which decided the case and he did not vote on the case. App. p. 32a.

In granting summary judgment in favor of Emery in an unpublished opinion, the District Court determined that "the whole issue in this dispute is whether the union improperly declined to represent plaintiffs at the hearing at all." App. p. 5a. The District Court reviewed the undisputed facts to determine when Petitioners knew or should have known that Local 85 would not represent them at the JWAC hearing. The District Court concluded that Petitioners knew this no later than July 28, 1993, when their counsel received the letter from Local 85's counsel. Because Petitioners did not file their action until May 1994, the District Court concluded that the action was filed outside of the six month statute of limitations. The District Court also found no basis for a tolling of the statute of limitations or for equitable estoppel:

> Plaintiffs simply took no action in response to the union's communications. Plaintiffs made no attempt to use the grievance hearing in good faith, and really did nothing at all. The union did not mishandle the grievance hearing on November 8. Indeed, it did what it said it would do — see that the procedures were open for plaintiffs to make their own presentation.

App. p. 8a.

The Ninth Circuit affirmed the District Court's summary judgment ruling in an unpublished memorandum opinion. The Court rejected Petitioners' contention that Ninth Circuit case law established a "bright line rule" that a duty of fair

representation claim does not accrue until the plaintiffs learn the result of the arbitration proceeding. The Court noted that under *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986), where the union decides not to pursue a grievance, the cause of action accrues "when the employee learns or should have learned of the union's decision." The Court distinguished another Ninth Circuit decision, *Kozy v. Wings West Airlines, Inc.*, 89 F.3d 635 (9th Cir. 1996), which involved a union's allegedly flawed representation at an arbitration hearing, rather than a failure to represent at all. The Ninth Circuit held that the District Court correctly relied on the Second Circuit's decision in *Buttry v. General Signal Corp.*, 68 F.3d 1488 (2d Cir. 1995), and that Ninth Circuit law was not inconsistent with *Buttry*.

The Ninth Circuit also addressed the merits of Petitioners' claim that Local 85 breached its duty of fair representation by failing to give them adequate notice of the grievance hearing, and with respect to the role played by Archie Murrietta in the conduct of the grievance proceeding. With respect to the former issue, the Ninth Circuit held:

> Here again we agree with the district court that the appellants received ample notice in the July and November letters. The letters told the appellants that their grievance would be considered at the upcoming meetings, and instructed them to call for precise details. They never did, and have offered no explanation for their failure to do so.

App. p. 11a. With respect to the Murrietta issue, the Ninth Circuit concluded:

> The record shows, however, that despite receiving notice, appellants never appeared

> at the hearing and did nothing to protect their interests there. We agree with the district court that appellants did "nothing at all" to avail themselves of the grievance process. They should not now be heard to complain about the manner in which it was conducted.

App. p. 11a. The Ninth Circuit panel subsequently voted to deny Petitioners' petition for rehearing and to reject the suggestion for rehearing en banc. No judge of the full Court requested a vote on the suggestion for rehearing en banc. App. p. 12a.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT ISSUES WARRANTING THE GRANT OF CERTIORARI.

The petition presents no special or important reason to support the exercise of this Court's certiorari jurisdiction. Contrary to Petitioners' claims, the Ninth Circuit's unpublished decision creates no conflict with any other Court of Appeals decision.[1] Petitioners' attempt to manufacture such a conflict is based on two cases. In fact, each of these cases is consistent with the Ninth Circuit's decision in this case. In addition, the Ninth Circuit's decision does not present an important question of federal law, but rather presents a fact-specific application of firmly-established legal principles. At most, Petitioners challenge the Ninth Circuit's application of settled legal principles to the undisputed facts of this case. This issue does not warrant grant of the petition.

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1. Even if the Ninth Circuit's decision did conflict with the law of other circuits (which it does not), the unpublished decision cannot create a conflict because it is not regarded as precedent and cannot be cited in other cases. *See* Ninth Circuit Rule 36-3.

A. The Court of Appeals' Unpublished Decision Does Not Create Any Conflict Among the Circuits.

Petitioners erroneously contend that the "Circuits are split on whether the limitations period starts to run when the grievance-and-arbitration process is concluded (the 'date of exhaustion' test) or when the employee knows or should know of the facts indicating a breach of the union's duty of fair representation in the handling of the grievance or arbitration, even if that is before any formal decision on the employee's grievance (the 'knows or should have known' test)." Petition p. 11. As the Ninth Circuit noted in rejecting Petitioners' appeal, the relevant case law "establishes no such bright line rule." App. p. 10a. Rather, when the alleged breach of the duty of fair representation involves a union's decision not to pursue a grievance, the cause of action accrues — and the statue of limitations begins to run — "when the employee learns or should have learned of the union's decision." *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986). It is only "where a duty of representation suit seeks to overturn an unfavorable arbitration award on the ground that the union committed errors in the arbitration proceedings," that "the claim accrues when the employee learns of the arbitrator's award." *Id.* The latter accrual rule has been applied in cases where the union actively represented the employee at the grievance hearing. *See Kozy v. Wings West Airlines, Inc.*, 89 F.3d 635 (9th Cir. 1996); *Ghartey v. St. John's Queens Hospital*, 869 F.2d 160, 165 (2d Cir. 1989); *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees*, 831 F.2d 429, 435-436 (3rd Cir. 1987); *Dowty v. Pioneer Rural Electric Cooperative, Inc.*, 770 F.2d 52, 56-57 (6th Cir.), *cert. denied*, 106 S. Ct. 572 (1985); *Lucas v. Mountain States Telephone and Telegraph*, 909 F.2d 419, 420-421 (10th Cir. 1990).

Contrary to Petitioners' assertion, all of the Circuits,

including the Third and the Eleventh Circuit, have used the equivalent of a "knows or should have known test" in determining the accrual of duty of fair representation claims. *See Vadino v. A. Valey Engineers*, 903 F.2d 253, 260 (3rd Cir. 1990) (six-month period commences " 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.' " (citations omitted); *Cox v. Administrator United States Steel and Carnegie*, 17 F.3d 1386, 1412 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995) (" 'Generally, a cause of action accrues under § 301, and the statute of limitations begins to run, when in the exercise of reasonable diligence the claimant knew or should have known of the injury.' ") (citations omitted). Indeed, the case which Petitioners claim is "the leading case" for establishing a rule which conflicts with the Ninth Circuit's rule, *Childs v. Pennsylvania Federation Brotherhood of Maintenance Way Employees*, based its analysis of the accrual issue on the Ninth Circuit's decision in *Galindo v. Stoody Co. See Childs*, 831 F.2d at 434.

B. The Ninth Circuit Applied Established Legal Principles to Petitioners' Factbound Claim.

In the present case the Ninth Circuit applied established principles of law to a unique factual situation. The union unequivocally informed Petitioners that it would not represent them at the JWAC hearing, but would allow Petitioners to present their grievance to the JWAC on their own. The union notified Petitioners that their grievance would be considered at upcoming JWAC proceedings, and instructed them to call a specified person for further information about the hearing. However, Petitioners never followed these instructions, and offered no explanation for their failure to do so. When Petitioners failed to appear for the scheduled JWAC hearing in August 1993, the hearing was postponed. When Petitioners again failed to appear for the

rescheduled JWAC hearing in November 1993, the JWAC proceeded to hear the case and rendered its decision in favor of Emery and against Petitioners.

In evaluating these extremely unique facts, both the District Court and the Ninth Circuit concluded that the case was most analogous to the decision in *Buttry v. General Signal Corp.*, 68 F.3d 1488 (2d Cir. 1995). In *Buttry*, the Second Circuit held that where the union gives advance notice that it will not advocate the employee's position at the arbitration hearing and, consistent with that position, does not actively represent the employee's interest in the arbitration proceeding, the employee's duty of fair representation claim accrues when he is informed of the union's position, not when the employee learns of the arbitrator's award. 68 F.3d at 1492-1493. The Ninth Circuit agreed with the District Court that to the extent Petitioners' claim was based on the theory that the union breached its duty by refusing to represent them at the JWAC hearing, this claim was time-barred because Petitioners received notice that the union would not represent them more than six months before the complaint was filed. The Ninth Circuit also considered and rejected the merits of Petitioners' claim that the union breached its duty of fair representation by failing to give them adequate notice of the grievance hearing, and by allowing Archie Murrietta to play a role in the November grievance proceeding. The Ninth Circuit agreed with the District Court that Petitioners received ample notice of the grievance hearing both in July and in November 1993. The Ninth Circuit also agreed with the District Court that because Petitioners never appeared at the hearing and did nothing to protect their interests there, "[t]hey should not now be heard to complain about the manner in which it was conducted."

Therefore, the Ninth Circuit's decision does not present an important question of federal law yet to be decided by this Court, nor does it conflict with any decision of this Court or with

opinions of the lower federal courts. The Ninth Circuit's decision merely presents a fact-specific application of well-established general principles concerning the accrual and merits of duty of fair representation claims. Indeed, the facts of this case are so unique that it is likely the issues decided by the Ninth Circuit will rarely, if ever, arise in the future. The case does not raise any important legal issues for the Supreme Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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